

United States District Court
District of Massachusetts

CIVIL ACTION NO:
10-10864

Dynamic Visions &)
Chief Bongam)
)
<i>PLAINTIFFS</i>)
)
v.)
)
Dept. of Health & Services)
)
<i>DEFENDANTS</i>)
)

Original Complaint

Now comes the PLAINTIFF, Dynamic Visions & Chief Bongam, who as Plaintiff, had Peck & Peck Law Offices send this. This is a Federal Question case.

Letter of Appeal & Allegation of Removal of Immediate Jeopardy

I, Russell Peck Jr., Attorney at Law, am now representing Dynamic Visions Home Health Services, which is a company of approximately three registered nurses, now, with their full corporation of your requests, (4) four registered nurses, i.e., the Director Rose Ake, RN, Head of Administration, Rebecca Njonj, RN, The Assisting RN, Cynthia Bongam, RN, and a Quality Control Administrator, Sydonic Bongam, B.S.N., who is responsible for patient charts and updates with records. Along with that staff, there are (3) three LPN's or licensed practical nurses, and approximately (30) thirty CNA's who are certified nurse assistants. In your May 14, 2010 letter, you claim that this home health service "No longer meets the requirements for participation as a Medicare provider established Under Title XVIII of the Social Security Act (the Act). *The plaintiff has the full records of their resumes and they will be entered into evidence.*

The Department of Health and Human Services has not explained properly, in this case, since within ten days it proposed terminating this business, to tell our office just what current requirements of the act, in words not just 42 CFR \$484.14, 18, 36, but in WORDS, what literally has to be now done, in a 90 day time period, to correct these alleged violations. Since Dynamic

Visions Home and Health Services, and Chief Isaiah Bongam, have done everything possible in the sparse (10) ten day time period, to comply with your requests, including, but not limited to, adding more Registered Nurses, in light of the untimely resignation of the former director of nursing, who goes by the name of Sophia, I believe, who left right before your surveyors came to this health Agency. According to what my office has been told, she basically did not even give two weeks notice to this agency that she would be leaving their employ for the other position she held concurrently with this position. This situation seems to be more than unfortunate it now seems to be extremely unfair, if not discriminatory.

The reasonable time period to ask for compliance would have been ninety days. Instead less than ten days was given for compliance, for whatever reason, you have. That is unconscionable. Unless you are willing to work with our office and with Dynamic Visions Home Health Services, we will be forced to seek an injunction in Federal Court, namely the Federal District Court of Massachusetts, precluding you from termination this company, and from publishing anything against This Company, which has U.S. Constitutional and federal rights and Massachusetts State's rights. If you so seek to harm this company, such damages will then be considered as a tort against this company and a suit will follow. I would rather work out a proper time line for correcting any enumerated necessary corrections of this company. The immediate jeopardy has been removed.

(The Plaintiff) literally does not understand the Defendants' claims, so far, and they seem not be accurate. For instance, the C.N.A.'s are well- experienced and they can communicate and practice basic infection control procedures, take patient temperature's, monitor respirations, take pulses and understand and follow necessary emergency procedures, in compliance of 42 CFR §484.36. Dynamic Visions Home Health, as well has proper Medical Supervision, they have a Medical Doctor who runs their Provisional Advisory Counsel which monitors patient acceptance and the Plan of Care, in compliance with 42 CFR §484.18. Finally, it is our understanding that there is a clinical record review, a group of professional personnel, a utilization review, and review of any allegations of patient abuse, neglect, misappropriation and fraud, in compliance with 42 CFR §484.14. As well, the C.N.A.'s are trained and certified and are willing to complete more hours of continuing education if that is what is necessary under the law.

Count I

Violation of the 5th Amendment "Takings" Clause

By misusing and being heavy handed, the government agencies which had originally given the Plaintiff until June to correct or explain any deviations from CMS and Massachusetts Health Department. They then changed the date to May 21, 2010 and told the Plaintiff that they would now terminate their license without giving a proper amount of time, 90 days, to correct the violations. One can only conclude that Dynamic Visions Health Care, a minority owned business, was being treated unfairly, heavy handedly, and discriminatorily. The nurses who ran the nursing and administration of this agency were belittled by the survey agency as well as the investigator as being 'inexperienced' or incompetent, and yet after our office's review of their resumes, we could only determine that that point was not true and definitely blown way out of proportion. Unfair governmental takings occurred here since the governmental agencies, the

Defendants, did not afford the Plaintiff the proper time to correct any violations and at the same time by threatening to take their license and giving the Plaintiff no time to cure the situation, patients would be lost, the company would lose its reputation, the company would then be unable to receive payments for services rendered, the company would then be unable to pay its creditors, and the company would be financially ruined, to the immediate detriment of the patients it now serves, to the certified nurse assistants who work for it, to the license practical nurses, LPN's, who monitor the patients and the nurse assistants and report to the Registered Nurses, who oversee the nursing operations and medical records. In support of this claim please see. The Plaintiff alleges that there is a clinical record review, a group of professional personnel, a utilization review, and review of any allegations of patient abuse, neglect, misappropriation and fraud, in compliance with 42 CFR §484.14. As well, the C.N.A.'s are trained and certified and are willing to complete more hours of continuing education if that is what is necessary under the law. The plaintiff now alleges that CMS and the Massachusetts Health Surveyors have conducted an unconstitutional taking of their business by unfairly and without a proper hearing taking their home health care agency license.

Count II

Violation of 1st Amendment Rights of the Plaintiffs for Free Speech and to Petition for a Redress of Grievances

Here, the plaintiff's constitutional rights under the 1st amendment have been violated. Neither the Commonwealth of Massachusetts Health Department nor the CMS Medicare/Medicaid Agency have properly held a hearing prior to threatening to take the home health care agency's license. See *DAVID HILL DEVELOPMENT, LLC v. CITY OF FOREST GROVE* (Or. 2-23-2010). There the Plaintiff is allowed an administrative review to listen to the Plaintiff's views on the application of the building code. Here, unlike that case, this is not a matter of law in question, but a matter of fact, since the information that forms the allegations of the CMS as well as the Massachusetts Surveyors, is in part, wrong and unfair, and the Plaintiffs need proper amount of time to review and respond to these false allegations. As well the Plaintiffs need an unbiased hearing where the claims of the investigator may be weighed against the proper responses of the Plaintiffs. See *CAREPARTNERS, LLC v. LASHWAY*, 545 F.3d 867 (9th Cir. 2008). In *CAREPARTNERS, LLC*, the plaintiff's speech was protected and he had a right to be heard, while the State, represented by Ms. Lashway did not have a right to violate Carepartners, procedural and substantive due process rights. Like that case, here, neither CMS nor the Massachusetts Health Department has the right to violate the procedural and substantive due process rights of the Dynamic Visions Health Care Agency, the Plaintiff.

Count III

Violation of the 14th Amendment to the U.S. Constitution

Which states, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof; are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Here, the officers of this corporation, are predominantly naturalized citizens and the company is an American corporation, with due process rights. Here, as well, due process has

been violated since CMS, a federal agency, as well as the State Agency, has denied a proper hearing to the Plaintiffs, and instead has promised to revoke and terminate their license before properly hearing their claims. This violates the 14th Amendment to the United States Constitution. See *DAVID HILL DEVELOPMENT, LLC v. CITY OF FOREST GROVE* (Or. 23-2010).

Case, which states, “for the United States Supreme Court recently held that the due process clause of the **14th Amendment** prohibits "grossly excessive" punishment in the form of punitive damages. See, e.g., *BMW of N. America, Inc. v. Gore*, ___ U.S. ___, [116 S. Ct. 1589](#) (1996) (punitive damages in excess of 500 times the amount of actual damages was "grossly excessive"). Here, the 14th Amendment and this Supreme Court Case law is being violated since the punishment of CMS and the Massachusetts Health Department, by quickly terminating the license of the Plaintiff without due process hearings is parallel to excessive punitive damages in its effects on this company. The damage to the Plaintiff is parallel to the concept of punitive damages, and the Commonwealth of Mass as well as CMS, is imposing this sort of damage by causing loss of business, by giving an unreasonable ten days, not the date in June the defendants first promised the Plaintiff, to make corrections, explanations and formulate a plan to address these problems in the future.

Count V
Violation of 42 U.S.C. § 1981

The plaintiff asserts that since Chief Bongam is from Cameroon, and since most of his workers are of African descent, that this is the racially charged reason that he was at first given until June 2010 to submit his answers to the alleged violations, many of which were untrue allegations by the Massachusetts Health Department Surveyors and by CMS. The underlying reason that the governmental agencies were so hard and unfair to Chief Bogman and his company, Dynamic Visions Health Care was because of racial insensitivity and discrimination. Such unfairness and heavy handedness cannot be tolerated in our society. To establish a claim under § 1981, a plaintiff must establish: (1) that he is a member of a racial minority; (2) intent to discriminate on the basis of race by the defendant; and (3) discrimination concerning one or more of the activities enumerated in the statute. *Brown v. Philip Morris, Inc.*, [250 F.3d 789, 797](#) (3d Cir. 2001). When Plaintiff's counsel approached the CMS investigator to learn more about the complaint he was abruptly re-directed to their legal department, which did not even return his calls. And the discrimination can be seen in the fact that though the complaint alleged the nurses were unqualified, this is not true, because they have years of qualifying experience, have been properly licensed and have excellent academic and work backgrounds. The only reason left for seeing why the state and CMS were so heavy handed with them is that this is a minority and mostly black African-American company. Case law refers to subtle forms of discrimination. Here this is not overt racism, with unreasonable findings and unreasonable time periods to respond and correct the situation, but it is a very subtle form of racism, against the minority-owned Plaintiff. The Plaintiff seeks primarily to stop this subtle form of racism. At no time does the Plaintiff claim any racial remarks were made, but only sees that disparate treatment of their health agency would tend to leave one believing that this behavior had deeper roots.

Damages: The Plaintiff only seeks to be treated fairly, and with due process, and given a reasonable time period to correct any actual and true deficiencies, where a reasonable time period would be at least ninety (90) days and not ten (10) days or a fluctuating date schedule. As well, the Plaintiff seeks attorney fees, to restore the Plaintiff to the position they were in prior to this action. Finally, the Plaintiff does not wish to be harassed by the Defendant or to be treated in a different manner, but would rather work in the future on a friendly, respectful, responsible and co-operative basis with the Defendants.

Sincerely,

Peck & Peck Law Offices, LLC

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Cc: Department of Health and Human Services – Dept. Appeals Board
Massachusetts Department of Health
Massachusetts State Survey Agency

Respectfully submitted
by Plaintiffs' attorney,

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CERTIFICATE OF SERVICE

I hereby certify that I have delivered a copy of the Original Complaint, propounded by the Plaintiffs, Dynamic Visions & Chief Bongam, to the Defendants Department of Health & Services, Cert. & Enforcement Branch, Centers for Medicare and Medicaid Services – CMS, JKF Federal building, government Center, room 2325, Boston, MA via process server.

/s/ Russell F. Peck, Jr., Esq.

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